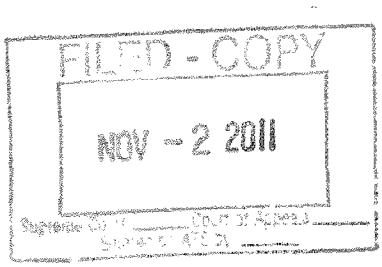
11-2-2011

State v. Fortin Appellant's Brief Dckt. 38069

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 38069
	)	
v.	)	
	)	
CODY JAMES FORTIN,	)	
	)	
Defendant-Appellant.	)	
	)	



APPELLANT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

PRESIDING JUDGE: HONORABLE PATRICK H. OWEN
District Judge

TRIAL JUDGE: HONORABLE D. DUFF MCKEE
Senior District Judge

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STATEMENT OF THE CASE

Nature of the Case

Appellant Cody Fortin (hereinafter Mr. Fortin and/or Appellant) appeals from convictions following a jury trial for the offenses of aggravated battery and use of a deadly weapon in the commission of a crime.

Course of Proceedings

After having been charged via complaint and amended complaint with aggravated battery and use of a deadly weapon in commission of a crime, Mr. Fortin waived his preliminary hearing and was bound over to the district court on those charges and a criminal information was filed. (R. p. 8-9, 13-14, 21, 22-23.)

The matter proceeded to jury trial where Mr. Fortin was found guilty as charged. (R. p. 69.) Mr. Fortin was sentenced to 25 years with the first 12 years fixed. (R. p. 80.) Mr. Fortin timely appeals. (R. p. 83.)

Statement of the Facts

This case was the subject of a jury trial. As explained by the victim, Darryl Shaylor, he was at a house party where people were drinking and using marijuana. (Tr. 5/17/2010, p. 2.) Mr. Shaylor testified that he only had one beer and was not using drugs.[1] (Tr. 5/17/2010, p. 5.)

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[1] This was a common theme of the state's witnesses, to wit, that there was alcohol, marijuana and according to one witness, methamphetamine, being used, but the particular witness testifying at the time insisted that he or she had not used the drugs and only had one drink.

Mr. Fortin and his friend Derrick came to the house and at some point, Mr. Fortin began arguing with one of the people there (Aaron Moore). (Tr. 5/17/2010, p. 6, 8.) When Mr. Fortin challenged the other people there as well, Darryl Shaylor told him "I'm not the person to be messing with tonight. I am in a bad mood." (Tr. 5/17/2010, p. 9, lns. 14-15.) According to Mr. Shaylor, about 5 or 10 minutes later Mr. Fortin came at him across the living room and so he stood up and Mr. Fortin swung at Mr. Shaylor (who said he usually waits for the first swing) and the fight happened from there. (Tr. 5/17/2010, p. 10.)

Mr. Shaylor testified that they went to the ground and were rolling around, and Mr. Fortin was trying to shove his fingers in his eyes and bite him and choke him. (Tr. 5/17/2010, p. 11.) Mr. Shaylor was able to take control and got on top and hit him and then hit him three more times in the forehead and it stopped things for a little bit and he was able to go out to the front of the house because he was feeling dizzy and had been losing blood. (Tr. 5/17/2010, p. 12.) He laid down outside and first he did not know he had been stabbed, he thought the blood was Mr. Fortin's but then realized it was his own (he had a stab injury to his neck/shoulder). (Tr. 5/17/2010, p. 12-13.)

Mr. Fortin then came outside and came up to Mr. Shaylor who saw a flash of something shiny by his pocket, and while he couldn't really see it, he assumed it was a knife. (Tr. 5/17/2010, p. 14, 18.) Mr. Shaylor said that Mr. Fortin hesitated but then his friend stepped up an encouraged him. (Tr. 5/17/2010, p. 16.) Mr. Shaylor asked him "What are you going to do with that?" (Tr. 5/17/2010, p. 18.) Mr. Fortin swung the knife and cut Mr. Shaylor across the face and then took off running. (Tr. 5/17/2010, p. 18.) Mr. Shaylor yelled at him "Are you kidding me?" (Tr. 5/17/2010, p. 19.) He felt a rush

again and laid down to try to cool down and looked around but Mr. Fortin was already gone. (Tr. 5/17/2010, p. 19.) Mr. Shaylor denied bringing or using a weapon that night. (Tr. 5/17/2010, p. 20.)

The state called many witnesses who were at the party, but none of them saw Mr. Shaylor get stabbed in the house. Kasey Smith, a close friend of Mr. Shaylor's, was at the party (where she only had one beer). (Tr. 5/17/2010, p. 51.) She testified she saw the slashing motion toward Mr. Shaylor while they were outside, although she did not put that in her statement to the police. (Tr. 5/17/2010, p. 59, 73, 74.) She never saw a knife but saw something shiny outside. (Tr. 5/17/2010, p. 83.) She also said that Mr. Fortin tried to get in Candice's car. (Tr. 5/17/2010, p. 60.)

Aaron Moore, who actually admitted to drinking 10 or 12 beers and a couple of shots of rum, did not see any of the fight because he was in the kitchen when it started and he ran away because he was a felon on probation. (Tr. 5/18/2010, p. 10, 16.)

James Bungard (who claimed he wasn't drinking or using drugs at all) testified that after the fight in the house, Mr. Fortin picked a knife up off the floor and folded it up and pretended to put it in his pocket. (Tr. 5/18/2010, p. 31, 43.) He said Mr. Fortin took the knife and went outside, and he peeked out the door and saw him quickly slash across Mr. Shaylor's face. (Tr. 5/18/2010, p. 44-45.) Interestingly, he denied that anyone was using marijuana (which almost all the other witnesses admitted), but testified that Kasey, Candice and John were smoking methamphetamine (which all the other witnesses denied) and that he had told the police that. (Tr. 5/18/2010, p. 52-53.) He also admitted that he didn't put anything in his statement to police about the

slashing, and had lied in the statement when he had said he saw Mr. Fortin brandishing a knife outside. (Tr. 5/18/2010, p. 60-61.)

John Vida, whose residence this occurred at (and who claimed he had like one or two beers but no drugs), didn't see the whole fight (or any knife). (Tr. 5/18/2010, p. 67, 70, 77.) At the first part of it he was in his backyard trying to keep his dog out of it and after the people went outside the house he saw nothing because he shut the door and locked it. Tr. 5/18/2010, p. 73, 79.)

Dawn Cliff, who had just started dating Mr. Shaylor (and claimed she wasn't drinking that night), saw Mr. Fortin outside holding what she believed to be a knife, because she saw a silver point, but she didn't see the full knife, and she didn't see what then happened between them. (Tr. 5/18/2010, p. 109-110, 112.)

Mr. Fortin did not testify at trial, however, he advised the PSI writer that while he engaged in a physical fight with the victim, he didn't stab him and never had a knife. (PSI, p. 3.)

ISSUES

I.

WHETHER THE COURT ERRED BY ADMITTING EVIDENCE OF MR. FORTIN'S FLIGHT

II.

WHETHER THE COURT ERRED WHEN IT REFUSED TO ALLOW THE DEFENSE TO CALL A WITNESS

III.

WHETHER THE COURT ERRED BY DENYING THE MOTION FOR MISTRIAL

IV.

WHETHER THE DOCTRINE OF CUMULATIVE ERROR REQUIRES REVERSAL

ARGUMENT

I.

THE COURT ERRED BY ADMITTING EVIDENCE OF MR. FORTIN'S FLIGHT

A. Standard of review.

The Idaho Supreme Court explained the standard of review for this issue in *State v. Moore*, 131 Idaho 814, 965 P.2d 174 (1998):

> Admission of evidence which is probative on the issue of flight to avoid prosecution requires the trial judge to conduct a two-part analysis. First, the judge must determine that the evidence is relevant under I.R.E. 401, and second, the judge must determine that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. This Court reviews the question of relevancy in the admission of evidence de novo. A court's decision that evidence is more probative than prejudicial is reviewed for abuse of discretion.

Id., p. 819 (internal citations omitted).

The Idaho Supreme Court in *State v. Sheldon*, 145 Idaho 225 (2008), detailed the abuse of discretion standard:

> When determining whether the district court abused its discretion, we consider:
>
> (1) whether the lower court rightly perceived the issue as one of discretion;
> (2) whether the court acted within the boundaries of such discretion and consistently with any legal standards applicable to specific choices; and
> (3) whether the court reached its decision by an exercise of reason.

Id., p. 228.

B. The arguments and rulings on flight.

The state filed a Notice of Intent to Use I.R.E. 404(b) Evidence, which provided as follows in full (R. p. 30.):

> COMES NOW, Christopher Atwood, Deputy Prosecuting Attorney for the County of Ada, and notifies the Court and Counsel of the State's intent to use facts as described below as evidence during the jury trial in this case. The State does not believe that the evidence falls under Idaho Criminal Rule 404(b) but out of caution the State provides this notice in the event the Court finds otherwise. If the Court finds the evidence is 404(b) evidence then the State believes the evidence of the defendant's crimes, wrongs, or acts is admissible to prove the defendant's identity.
>
> The state intends to introduce evidence of the Defendant's conduct when he was approached by law enforcement officers the day after the aggravated battery occurred. When the officers approached the Defendant and informed him he was under arrest, the Defendant fled from the officers indicating consciousness of guilt from the aggravated battery he had committed one day earlier. This evidence was disclosed to Defendant in the police reports in the State's Discovery Response in CRFE2009-0019475.

Notice of Intent to Use I.R.E. 404(b) Evidence, p. 1-2. (R. p. 30-31.)

The defense objected to the I.R.E. 404(b) (hereinafter 404(b)) evidence and the matter was taken up at trial outside the presence of the jury. Defense counsel had attempted to obtain a pre-trial ruling, but the court would not take it up earlier. (Tr. 5/18/2010, p. 214, 217.)

The offer of proof by the prosecutor was that the day following the stabbing, a number of law enforcement officers approached the defendant to arrest him while he was in his vehicle. A number of officers tried to use their cars to surround the defendant while he was in his car. They had their lights on and approached the car with guns drawn and police badges visible. (Tr. 5/18/2010, p. 208.)

When the officers approached, the defendant fled from them in his car. They pursued him approximately 8-10 miles when he crashed his car and ran on foot into a field and then into a wooded area and into a ditch. The officers had called for backup and a number of officers pursued him and surrounded the ditch and called for him to come out with his hands up. Eventually they called in a K-9 who went in and bit the defendant. The defendant eventually did come out and was arrested. (Tr. 5/18/2010, p. 208-209.)

The prosecutor stated he did not intend to introduce the fact that the defendant struck a police officer during his flight because that is the subject of a different charged case, aggravated battery on a law enforcement officer. Further, the prosecutor stated that he didn't intend to introduce all of the evidence of the eluding because that is largely the other case as well, and so he did not intend to get into how fast he was going and whether or not he put other people at risk and the fact that he side-swiped another vehicle. But the prosecutor stated that he does intend to introduce the distance of the flight and that he continued his flight on foot. The prosecutor explained that he filed the 404(b) notice out of an abundance of caution, he does not believe it is 404(b) evidence, but rather, is evidence of flight. (Tr. 5/18/2010, p. 209-210.)

In response, defense counsel confirmed that there are two criminal cases pending against the defendant in this jurisdiction, the instant aggravated battery and the other one charging eluding. (Tr. 5/18/2010, p. 210.) The state did not consolidate the cases. (Tr. 5/18/2010, p. 216.)

Defense counsel argued that the prosecutor's recitation of what happened was not complete. The officers were actually plain clothes officers and were driving undercover (as opposed to simply unmarked) cars, to wit, a PT Cruiser.[2]

Thus, according to defense counsel, where undercover officers approach in plain clothes and unmarked cars, it is not even evidence of flight to avoid prosecution. (Tr. 5/18/2010, p. 215.) Defense counsel explained that Mr. Fortin's position was that the alleged victim had actually brought the knife to the fight the night before, and now someone was approaching him with a gun. (*Id.*)

The court clarified that the state does not believe that the evidence falls under 404(b) because it is not evidence of prior bad acts, but is evidence of flight from this act. (Tr. 5/18/2010, p. 212.) The court's ruling was as follows:

> The law for years has been that flight can be argued—a flight to avoid arrest can be argued by the prosecutor as indicia of guilt. At one time, in fact, there was a pattern jury instruction where the jury was instructed that if an accused defendant fled, that the jury could construe the fact that a defendant was fleeing to avoid arrest to be an indication of guilt.
>
> Modern instruction practice says you don't instruct juries that way anymore, but I think that the law in Idaho clearly is that counsel are entitled to argue the facts. The rational basis of that is that the circumstances, a defendant's conduct, a defendants' demonstrated conduct from the time of the event giving rise to the criminal charge to at least a reasonable time thereafter is relevant for examination to see not just what did the defendant do at the time of the crime, but what did he do after the crime was-after the alleged crime was committed. How did he

[2] Actually, the detective testified at trial they were driving a Nissan Altima, a Honda Accord, and a GMC SUV of some kind. (Tr. 5/19/2010, p. 57, 60.) Also, while their lights were on as the prosecutor stated, they were not traditional light bars, for instance, one car had wig wag lights (the headlights alternatively flashing) and also had rapid motion LED lights on the passenger side visor, and another car had the rapid motion LED lights on its grill. (Tr. 5/19/2010, p. 42-43.) As to their dress and identification, the detective testified that he was wearing civilian clothing (T-shirt) with his badge hanging around his neck and another officer was wearing a black windbreaker with a flip down police insignia which was not flipped down. (Tr. 5/19/2010, p. 47, 62-63.)

comport himself? Where did he go? What did he do? How did he respond when approached by officers? That is all within the –the old-fashioned word is "res gestae." I don't know what the modern term is but there is a more modern term for that. But that is all in the gambit of relevant circumstances and it is fair game for both sides to investigate and examine.

It is equally appropriate, for example, if a defendant's conduct is completely the other way from any indication of guilt, that the defense may bring forward that it shows that his comportment and activities and conduct after the allegation are totally inconsistent with the prosecutor's allegation of the occurrence of a crime. So it cuts both ways. What did the defendant do? How did he act? How did he respond? What was his conduct at least to the extent that you have a reasonable time after, and I think here we are talking about one day and think that is certainly within reach.

I indicated that I didn't think it was a 404(b) problem because I think 404(b) discusses prior bad acts or unrelated bad acts. And if you are examining a defendant's conduct after a circumstance with relation to the circumstance itself it is not a 404(b), it is an extension of the defendant's conduct in connection with the circumstance.

Tr. 5/18/2010, p. 220, ln. 24—p. 222, ln. 22 (emphasis added).

A colloquy then occurred about the evidence of the police dog which went in and bit Mr. Fortin, after which the court continued:

I am not sure where that goes. My struggle on this is an extraneous issue that we are going to explore at some length that doesn't have anything to do with any of the elements of the crime. And once you get the dog involved in this thing, I think fear of the dog—that doesn't have any necessary connection to flight to avoid arrest.

[PROSECUTOR] No, it is just how the officers found him.

THE COURT: But that is not relevant. The fact that they –I can understand the argument that he in his flight is evidence. The officers' response is not necessarily indicative of anything.

His flight, okay. Officers gave chase. Well, because A follows B, I'll say okay, they gave chase because that leads to the chase on foot. But I don't think you need to add—you don't need to embellish the chase with the fact that it was 990 miles-an-hour though downtown Boise, you have already indicated that you are not going there, anyway.

Tr. 5/18/2010, p. 225, ln. 2-24 (emphasis added).

A colloquy then occurred about the details of the chase, after which the court stated:

> . . . I will let you put in evidence of flight but without emphasizing the police officers' response to that other than the fact that they did pursue, they did pursue him, they did add officers as needed until they finally had enough officers and had him surrounded and accomplished the arrest. Will that satisfy that State?
>
> [PROSECUTOR] It will.
>
> THE COURT: With that caveat I will allow the testimony, and with the representation that you are not going to go into the high speed, the crash, and the crashing into the police car, and crashing into the civilian car.
>
> [PROSECUTOR]: That is fine.
>
> [DEFENSE COUNSEL]: Judge, I think I should put out for the record I do just want to renew my objection to any of this evidence coming in.
>
> THE COURT: I didn't think you were very happy about this.
>
> [DEFENSE COUNSEL]: I just wanted to make sure there is a record.

Tr. 5/18/2011, p. 228, ln. 16—p. 229, ln. 14.

C. The court erred by admitting the evidence of flight.

First of all, the district court erred by not understanding that the evidence of flight is other bad acts evidence. Then, since it did not understand the type of evidence at issue, it failed to use the proper two step test to determine the evidence's admissibility.

The court at one point stated that the flight evidence did not fall under I.R.E. 404(b) (hereinafter 404(b)) because was not prior bad acts evidence, and later, stated there was no 404(b) problem because it did not concern prior or unrelated bad acts.

The district court was wrong, flight is other bad acts evidence. As explained by the Idaho Court of Appeals in *State v. Rossignol*, 147 Idaho 818 (Ct.App. 2009):

> Escape or flight is one of the exceptions to the general rule prohibiting evidence of prior bad acts or crimes. *State v. Cootz*, 110 Idaho 807, 814, 718 P.2d 1245, 1252 (Ct. App. 1986). Evidence of escape or flight may be admissible because it may indicate a consciousness of guilt. *Id.* However, the inference of guilt may be weakened when a defendant harbors motives for escape other than guilt of the charged offense. *Id.*
>
> Admission of evidence which is probative on the issue of flight to avoid prosecution requires the trial court to conduct a two-part analysis. *State v. Moore*, 131 Idaho 814, 819, 965 P.2d 174, 179 (1998). First, the trial court must determine that the evidence is relevant under I.R.E. 401; and, second, the court must determine that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. *Id.* This Court reviews the question of relevancy in the admission of evidence de novo. *Id.* A trial court's decision that evidence is more probative than prejudicial is reviewed for abuse of discretion. *Id.*

Id. p. 821-822.

In other words, even though there is an established exception by which flight evidence may be admissible, it is still other bad acts evidence. Thus, the proper other bad acts test must be used.[3]

So in our case, the district court was required to perform a two step analysis. First, the court had to find that evidence of flight was relevant. It then needed to determine that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

In addition to the law specific to evidence of flight which requires the two step analysis, such as *Rossignol*, *supra*, as well as *State v. Moore*, *supra*, since the evidence that the state desired to introduce was also an uncharged crime, the district

[3] Incidentally, while 404(b) evidence is commonly referred to as prior bad acts evidence, there is no requirement that it be prior (and flight of course would not be), the rule simply refers to "other crimes, wrongs or acts."

court should have also known to perform the two step test under 404(b) itself. Here, the other bad acts evidence constituted the crime of eluding police, which was not charged in this case, but in a separate case.

This situation is similar to that in *State v. Sheldon*, 145 Idaho 225 (2008), where the Idaho Supreme Court had to determine whether the defendant's admission that he had earlier dealt methamphetamine fell under 404(b).

> The initial question is whether Sheldon's statements were admissions of a past crime, wrong, or act. Since methamphetamine dealing is prohibited under I.C. § 37-2732B(a) (also I.C. § 37-2732(a)), his admission would be categorized as 404(b) evidence. Thus, the trial court was required to make a two-tiered analysis to determine whether the evidence was inadmissible propensity evidence under 404(b) or whether the evidence could be admitted for some other purpose. First, the court considers whether the evidence is relevant to a material disputed issue concerning the crime charged. Second, the court considers whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant. This Court exercises free review over the first inquiry - relevance - but reviews the second inquiry - risk of unfair prejudice - under an abuse of discretion standard. Unfortunately, the district court appears not to have recognized the statements as 404(b) evidence and, thus, failed to perform the two-tiered analysis.

Id., p. 229 (emphasis added, internal citations and footnote omitted).

Our case is the same, since eluding police is a crime it would be categorized as 404(b) evidence and the two-tiered analysis required.

So in our case, whether analyzed under the established law regarding flight evidence or the more general law regarding other bad acts, the district court was clearly required to perform the two step analysis prior to its admission. As to the first step,

relevance, although it made some contrary comments, it does appear that the court did rule that the flight evidence was relevant.[4]

However, the court clearly never made any ruling about probative value or prejudice, presumably because it did not believe that the flight evidence was other bad acts evidence for which that second step was required. However characterized, this failure by the court was error. At the very least, the court abused its discretion since it admitted evidence without reference to the legal standards regarding such evidence.

In *State v. Perry*, 245 P.3d 961 (Idaho 2010), the Idaho Supreme Court explained:

> Idaho shall from this point forward employ the *Chapman* harmless error test to all objected-to error. A defendant appealing from an objected-to, non-constitutionally-based error shall have the duty to establish that such an error occurred, at which point the State shall have the burden of demonstrating that the error is harmless beyond a reasonable doubt.

Id., 974.

In this case, the defense objected below and has established on appeal that an error occurred. Accordingly, unless the State meets its burden, the convictions must be reversed.[5]

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[4] The court mentioned at one point that the flight issue has nothing to do with any of the elements of the charged crime. It also holds that the use of the dog is not relevant, however, the court never reconciles just why if the dog is not relevant, anything else about the chase would be.

Also, it is interesting to note that the State's notice of intent to use 404(b) evidence said that the evidence of flight was relevant to show identity, which was never mentioned by the court as a reason the evidence was relevant.

[5] This is true for every issue on appeal, each having been objected to at trial.

II.

THE COURT ERRED BY EXCLUDING A DEFENSE WITNESS

A. Standard of review.

A lower court's determination under I.R.E. 403 will not be disturbed on appeal unless it is shown to be an abuse of discretion. *State v. Birkla*, 126 Idaho 498 (Ct.App. 1994).

B. The background and court's rulings.

After the state rested, defense counsel stated that he had spoken with a witness, Candice Waters, during the break and she said that she overheard Darryl Shaylor (the victim) discussing his testimony with another witness (Kasey Smith) and that Candice knew specific questions that counsel had asked Darryl Shaylor.[6] (Tr. 5/19/2010, p. 101-104.)

Apparently, both Kasey Smith and Darryl Shaylor had already testified when they had their discussion. (Tr. 5/19/2010, p. 105.) Candice Waters had been listed as a witness by the state, but had not been called. (Tr. 5/19/2010, p. 102-103.) Defense counsel indicated that he might call her. (Tr. 5/19/2010, p. 102.)

As to the relevance of her testimony, defense counsel explained that a primary issue of the defense was that Darryl Shaylor and other witnesses had all been talking about their stories and their stories had changed. (Tr. 5/19/2010, p. 110-111.)

Despite the fact that the witnesses were violating the court's order to not discuss the case, the court stated there was no proof that any testimony was tainted since the

[6] Earlier in the trial there had been another instance where Darryl Shaylor had been discussing the case with another witness. Dawn Cliff overheard them and testified about it. (Tr. 5/19/2010, p. 5-12, 105-107.)

two witnesses discussing their testimony had already testified and while Candice may have overheard, she was not going to be called as a witness. (Tr. 5/19/2010, p. 107.) Thus, the court ruled that it was not going to allow the defense to call Candice Waters to testify about overhearing Darryl Shaylor discussing his testimony with another witness. (Tr. 5/19/2010, p. 108, 116-117.)

Further, the court would not allow the defense to call Candice Waters as an eyewitness to the crime. As defense counsel explained, she was an eyewitness who filled out a police statement form. (Tr. 5/19/2010, p. 114.) Defense counsel made an offer of proof, and related that during the break, she told him that she did not see Mr. Fortin throw a punch, it may have happened, but she didn't see it. (Tr. 5/19/2010, p. 114-115.) The court asked whether she was in a position to observe, and defense counsel said he didn't know, that is what this trial is for. (Tr. 5/19/2010, p. 115.) Defense counsel also explained that she would also testify that Mr. Fortin came to her car accidentally, and she had to tell him it was her car, not his. (Tr. 5/19/2010, p. 115.)

The court ruled that there was nothing relevant that was not cumulative of what the State had already presented and there is nothing exculpatory because counsel was not saying that she would testify that it did not happen, the most she can say is she didn't see it happen and that's already been the testimony of a handful of witnesses. (Tr. 5/19/2010, p. 115.) Counsel responded that those witnesses had changed their stories from their written statements to now saying they did see something outside, to which the court responded that was not accurate. (Tr. 5/19/2010, p. 115-116.)

Counsel clarified that the court was ruling that he could not call Candice Waters and the court said he could not unless he could show something that was not

cumulative or was exculpatory. Defense counsel stated that she did not see Mr. Fortin throw a punch or make a slapping motion outside. Second, she had testimony regarding the credibility of the witnesses, having been present on two occasions where Darryl Shaylor was discussing the case with other witnesses (the other one which Dawn Cliff testified about). (Tr. 5/19/2010, p. 116.)

The court ruled as follows:

> Which I would not permit you to go into [Shaylor talking to other witnesses], in–in that aspect, because it doesn't impact—if–from that testimony only, because that's already been inquired into, unless she was a witness.
>
> And unless you can represent that she was a –that she saw it, --that it didn't happen, not that she didn't see it happen, because that's not necessarily exculpative, unless you can prove—unless you can establish that she was in a position to see, and was looking, and it didn't happen, didn't–by--by saying she didn't see it happen that it didn't happen.
>
> If she wasn't looking, and what I'm understanding you to say is she didn't see it happen, but it could have happened, which kind of says to me she was not in a position to observe, which is not exculpatory.
>
> I would otherwise rule that—on–on the State's case, it's--that--that anything else she adds is cumulative to what the State's already added.
>
> [DEFENSE COUNSEL]: The only thing-the only information I can give the Court, as an offer of proof of what Candice Waters is going to say, is her statement and the--what she just told me in the hall. So other than that , I request that we be allowed to call her as witness.
>
> THE COURT: On the--offer of proof, I would find that the evidence--the constructive evidence of what she did observe is cumulative to what the State has already offered and not exculpatory. And Counsel has not offered anything in the offer of proof that is exculpative. And therefore, the test—the testimony would be cumulative to the State's offer and otherwise irrelevant.

Tr. 5/19/2010, p. 116, ln. 25—p. 118, ln. 6.

Not being allowed to call the witness, the defense rested without calling any witnesses. (Tr. 5/19/2010, p. 119.)

C. The court erred by excluding the defense witness.

While the district court did not cite any authority for its ruling excluding the witness, presumably it was pursuant to I.R.E. 403, which provides as follows:

> Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.
>
> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

I.R.E. Rule 403 (emphasis added).

While the court claimed that Candice Water's testimony was inadmissible because it was cumulative to what the State had already presented, just because other witnesses had testified to the subject matter does not make it needlessly cumulative and therefore inadmissible.

As explained in *State v. Blackstead*, 126 Idaho 22 (Ct.App. 1994):

> Statements by witnesses which corroborate the facts to which another has already testified are not necessarily inadmissible because they are "cumulative." Rule of Evidence 403 prohibits the introduction of needlessly cumulative evidence. There is no merit in the argument that this evidence was needless. The entire tenor of Blackstead's defense was that the victim had recently fabricated the allegations against him for the purpose of staying at the treatment facility or being placed with her stepmother rather than returning to her natural mother. Such an implication of recent fabrication gives importance to evidence corroborating the victim's testimony that she had mentioned the defendant's misconduct to someone within days of the occurrence.

Id. p. 22.

Like in the case above, in our case, the proposed testimony was corrobative, not cumulative, or if it was, it was not needlessly so. The evidence regarding Mr. Fortin cutting Mr. Shaylor's face while outside was extremely inconsistent. Only one witness (John Bungard) actually testified that he had saw both the knife and the slashing, but he also admitted he lied in his police statement about Mr. Fortin brandishing the knife outside and that he didn't mention the slashing in his statement to police.[7]

Kasey Smith, Mr. Shaylor's very close friend, testified she saw the slashing motion toward Mr. Shaylor while they were outside, although she did not put that in her statement to the police, and she never saw a knife but saw something shiny outside.

Dawn Cliff, who had just started dating Mr. Shaylor, saw what she believed to be a knife, because she saw a silver point, but she didn't see the full knife, and she didn't see what then happened between them.

While two other witnesses did not see what happened outside, it was because they were not outside when it happened. Aaron Moore had run away and John Vida had shut the door and locked it.

Given this testimony, the testimony of Candice Waters, to wit, that she did not see Mr. Fortin punch or slash Mr. Shaylor while they were outside, is not cumulative. While her testimony may have been the same as what all the other witnesses (who were outside at the time) told the police, for two of the three witnesses, their stories changed by the time of trial and they had now seen the slashing motion. Therefore, instead of being needlessly cumulative because it was the same as the other witnesses,

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[7] Significantly, his testimony about the drug use in the house was completely different from everyone else's, he denied anyone was using marijuana but stated that other witnesses were using methamphetamine.

the testimony of Candice Waters actually corroborated the defense theory of recent fabrication and impeached the two witnesses who did change their story. In short, where the state's witnesses are changing their story, the defense should be allowed to put on the witness who didn't.

Also, by the time of trial, only Dawn Cliff testified that she did not see the slashing motion so Candice Water's similar testimony should have been considered to be corroborative of that, not needlessly cumulative. The district court was simply wrong when it stated that a handful of witnesses had already testified this way.

Further, this was evidence favorable to the defense and was the only witness the defense would be calling. The court was incorrect in requiring defense counsel to establish prior to testifying that the witness had the opportunity to observe since as he stated, that is what the trial is for. More to the point, that was the prosecutor's job, if she didn't have the opportunity to observe then her testimony would be impeached, not disallowed in its entirety.

Finally, Candice Waters also had evidence that no one else did, to wit, that Mr. Fortin accidentally went to her car and she had to tell him to go to his. While Kasey Smith testified that he went to Candice's car, she did not include the part that it was by accident, and so the jury could have been left with the impression that Mr. Fortin was trying to attack Candice as well, and her testimony would clarify that he was not.

To summarize, a witness who says she did not see a disputed event happen is providing exculpatory evidence, and her ability to see is a matter for cross examination. Further, her evidence was not needlessly cumulative; it corroborated the other witness who did not see the slash and also impeached the witnesses who only recently said

they saw it. Finally, Candice Waters had the clarifying testimony about the car that no one else did.

While the district court's rush to conclude what it obviously considered to be a slow trial may well be understandable, it should not have come at the expense of excluding the one and only defense witness. For all the reasons above, the district court erred by excluding the witness.

III.

THE COURT ERRED DENYING THE MOTION FOR MISTRIAL

A. Standard of review.

The standard of review was explained by the Idaho Supreme Court in *State v. Field*, 144 Idaho 559 (2007):

> When there is a motion for mistrial based upon prosecutorial error supported by a contemporaneous objection to the underlying procedural or evidentiary error we review the denial of a motion for mistrial for reversible error.
>
> > [T]he question on appeal is not whether the trial judge reasonably exercised his discretion in light of circumstances existing when the mistrial motion was made. Rather, the question must be whether the event which precipitated the motion for mistrial represented reversible error when viewed in the context of the full record. Thus, where a motion for mistrial has been denied in a criminal case, the "abuse of discretion" standard is a misnomer. The standard, more accurately stated, is one of reversible error. Our focus is upon the continuing impact on the trial of the incident that triggered the mistrial motion. The trial judge's refusal to declare a mistrial will be disturbed only if that incident, viewed retrospectively, constituted reversible error.

Id. p. 571 (internal citations omitted).

B. The motion and the court's ruling.

On cross examination, defense counsel was asking Mr. Shaylor whether he ever got a clear look at the knife because he had just said it was a shiny object. The following exchange took place:

> A. Not a clear look, but I believe getting cut across the face and stabbed in the neck and seeing a shine, you know it's a knife.
>
> Q. So it's just your opinion that this was a knife?
>
> A. I knew it was a knife. I couldn't determine which kind.
>
> Q. How do you know it was a knife?
>
> A. Because it punctured me in the neck and cut me across the face, and I know most gang members carry those.

Tr. 5/17/2011, p. 30, lns. 15-24 (emphasis added).

Defense counsel started to object and the court ruled that volunteered answer about the gang member be redacted and the jury to disregard it. However, the court stated that was all it would do since it was an open ended question, but that it would take up counsel's motion at the break. (Tr. 5/17/2010, p. 31.)

At the break, defense counsel moved for a mistrial, arguing that his question in no way, shape or form invited a response regarding gang members. Defense counsel argued that given the current prejudice against gangs, it is one of the most prejudicial things that could have been said, and it is too inflammatory to be cured by a curative instruction. (Tr. 5/19/2010, p. 41-44.)

The prosecutor stated that he had not intended to bring up the fact that he was a gang member.

> And I've advised them, and I'm pretty sure I advised the victim the same thing, Mr. Shaylor, that it is not to be mentioned unless you're asked a

> question that calls for it, and that you cannot lie if asked a question. You must tell the truth, but not to volunteer that information unless it's asked of you.

Tr. 5/17/2010, p. 45 lns. 13-18.

The court again ruled that defense counsel invited the error because he asked "how do you know," which allowed him to say everything that was going on in his mind, which included that gang members carry knives. If defense counsel wanted to avoid a particular answer, he should have asked precise questions or brought a motion in limine. Thus, while the court struck the answer and instructed the jury to disregard it, the court ruled that it is not a mistrial issue and denied the motion for mistrial. (Tr. 5/17/2010, p. 47-48.)

C. The court erred by denying the motion for mistrial.

Appellant disagrees with the court that the question invited the answer. The witness was simply taking advantage of the open ended question to inject prejudicial information to the jury, rather than it being some valid answer based on stream of consciousness thinking as apparently held by the court.

We know this because of the prosecutor's comments, which the court ignores. The prosecutor's admonishment was that gang information was not to be mentioned unless a question calls for it and it was not to be volunteered. In other words, even if in the victim's mind a reason he knew it was a knife was because gang members carry knives, he had been admonished to not mention gangs unless a question called for it, and it cannot seriously be argued that the question called for that answer even if he was thinking it. Even the court referred to it as a volunteered answer, showing that the question did not call for that answer.

Therefore, this is not a matter of a two word blurt out answer which was not mistrial material as held by the court. Rather, it was a victim in a case intentionally prejudicing the defendant by providing inflammatory information despite the fact that he had been told not to.

As further evidence that this was not just some inadvertent mistake, it must be remembered that this same witness also violated the court's order to not discuss his testimony with other witnesses on two different occasions. While defense counsel may have not been able to establish that this affected other testimony, it nevertheless shows that this witness was intentionally violating admonishments, and in this instance at least, did so in an obvious attempt to unfairly prejudice the defendant. This is mistrial material, and the court erred in denying it.

IV.

THE DOCTRINE OF CUMULATIVE ERROR REQUIRES REVERSAL

Appellant asserts that the errors discussed above combine to constitute cumulative error. In *State v. Cook*, 144 Idaho 784, 171 P.3d 1282 (Ct.App. 2007), the Court of Appeals explained:

> Having identified multiple errors, we would normally address whether, pursuant to I.C.R. 52, each of these errors was harmless. However the cumulative error doctrine requires reversal of a conviction when there is an accumulation of irregularities, each of which by itself may be harmless, but when aggregated, show the absence of a fair trial in contravention of the defendant's constitutional right to due process. In order to find cumulative error, this Court must conclude there is merit to more than one of the alleged errors and then conclude that these errors, when aggregated, denied the defendant a fair trial.

Id., 171 P.3d at 1289 (footnote and internal citations omitted).

The multiple errors in this trial have all been discussed at length above. Therefore, they will not be unnecessarily repeated in this section, but Appellant will simply request that his convictions be reversed and the case remanded for a new trial because of the cumulative error.

CONCLUSION

Mr. Fortin respectfully requests that this Court vacate his conviction for aggravated battery with deadly weapon enhancement.

DATED this 2nd day of November, 2011.

Greg S. Silvey
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of November, 2011, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by the method as indicated below:

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Greg S. Silvey